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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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9 CHANDRA KISHOR, No. CIV S-03-1219-LKK-CMK-P

10 Petitioner,

11 vs.

ORDER

12 ATTORNEY GENERAL OF THE
13 STATE OF CALIFORNIA, et al.,

Respondents.

14 _____ /
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16 Petitioner, a state prisoner proceeding pro se, brings a petition for a writ of habeas
17 corpus pursuant to 28 U.S.C. § 2254.

18 On March 25, 2005, the Magistrate Judge issued findings and recommendations
19 that respondents' motion to dismiss be granted and that the petition be dismissed. Specifically,
20 the Magistrate Judge concluded:

21 After reviewing the record in this action, the court finds that
22 petitioner has failed to exhaust state court remedies as to his claim of
23 entrapment. Accordingly, the petition is a mixed petition containing both
exhausted and unexhausted claims and must be dismissed.

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25 The Magistrate Judge recommended that: (1) petitioner be granted leave to file an amended
26 petition raising only exhausted claims; (2) petitioner should file a state petition on the entrapment

1 claim within 30 days after filing an amended federal petition; and (3) that this action be stayed
2 and proceedings held in abeyance pending resolution of the new state petition. The Magistrate
3 Judge also recommended that, once state court proceedings were completed, petitioner should
4 file an amended petition “to present a fully exhausted petition to the District Court.” The
5 findings and recommendations cautioned that, if petitioner did not comply, his case could be
6 dismissed.

7 On April 8, 2005 – before the findings and recommendations had been adopted –
8 petitioner filed a document entitled “Delete & Stay Unexhausted Claim & Amended Petition.”
9 In this document, petitioner expressed his agreement with the March 25, 2005, findings and
10 recommendations. On June 7, 2005 – also before the findings and recommendations had been
11 adopted – respondents filed a statement of non-opposition to petitioner deleting the unexhausted
12 claim and holding proceedings on the remaining exhausted claims in abeyance.

13 On September 16, 2005, the court issued an order adopting the March 25, 2005,
14 findings and recommendations. The order dismissed the petition without prejudice. Judgment
15 was entered accordingly on that same day. Since judgment was entered, petitioner has presented
16 his entrapment claim to the state courts. Specifically, on June 26, 2006, petitioner filed a
17 document attaching: (1) an order from the Sacramento County Superior Court issued on June 14,
18 2005, denying petitioner’s entrapment claim both on state procedural grounds and on the merits;
19 (2) an order from the California Court of Appeal issued on August 11, 2005, denying the
20 entrapment claim without comment or citation; and (3) an order from the California Supreme
21 Court issued on June 14, 2006, denying the entrapment claim with citations to In re Clark, 5
22 Cal.4th 750 (1993), and In re Robbins, 18 Cal.4th 770, 780 (1998). Attached to petitioner’s June
23 26, 2006, filing is an amended federal petition as to all claims, including the now-exhausted
24 entrapment claim.

25 In light of the foregoing procedural history, it appears that the September 16,
26 2005, judgment was entered in error. Specifically, while the court adopted the Magistrate

1 Judge's findings and recommendations in full, petitioner was not specifically granted leave to file
2 an amended petition and this action was not stayed. Rather, the court dismissed the petition
3 without prejudice. Because the court originally envisioned a stay-and-abeyance procedure for
4 this case which would preserve petitioner's original filing date, and because petitioner has now
5 exhausted all his claims and presented this court with an amended petition, the court will vacate
6 the September 16, 2005, order and judgment pursuant to Federal Rule of Civil Procedure 60(a).
7 This action will now proceed on the amended petition attached to petitioner's July 26, 2006,
8 filing, which the Clerk of the Court will be directed to file separately.

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. The September 16, 2005, order and judgment are vacated;

11 2. The Magistrate Judge's March 25, 2005, findings and recommendations

12 are adopted;

13 3. Respondents' motion to dismiss (Doc. 14) is granted;

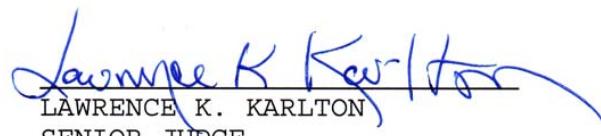
14 4. The amended petition (Doc. 8), filed on October 10, 2003, and as further
15 amended on April 30, 2004 (Doc. 17) is dismissed;

16 5. The Clerk of the Court is directed to separate and file the amended petition
17 attached to petitioner's July 26, 2006, submission (Doc. 27);

18 6. Respondents are directed to file an answer to petitioner's amended petition
19 within 30 days from the date of service of this order; and

20 7. Petitioner's traverse or reply shall be filed and served within 30 days of
21 service of respondents' answer.

22 DATED: October 30, 2006.

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25 LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT
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